

Strategies for Preventing and Litigating Residential Placement Disputes

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Prevention Strategies

- **Watch for students with community problems**

E.g., drugs, family disputes, runaway, nights away from home, juvenile justice involvement

Monitor status of issues, level of parent distress

Seek to coordinate with private counselors, adjust school counseling goals accordingly

Consider parent counseling services

Prevention Strategies

- **Evaluate the home/family situation**

Usually, in the form of a needs assessment

Assesses home issues and impact on school functioning, potential services needs

Potential services: parent counseling, parent training, in-home training, coordination with private services

Needs to be conducted at early stage of problem, rather than when situation is in crisis

- **Consider placement in structured self-contained school settings**

Features: high structure, low staff-to-student ratio, specially trained staff, limited transitions within campus, ability to implement complex behavior interventions

In small districts, may have to be cobbled together...

Various models of re-transition back to less restrictive placement

- **Confirm IEP Fundamentals are sound**

FBA must be proportionate in depth/quality to degree of student's behavior problems

BIP may require staff training sessions

Involvement of school psych/behavior specialist

Psych services, Social skills program, home services, sp ed counseling (watch amount)

Crisis/emergency plans, restraint training

- **Address IEP weaknesses aggressively**

Critical self-eval of IEP quality is crucial, but can be a challenging part of attorney-client relation

Conferring with supt or central office admins may be required to get things to happen

Legal research: determine which IEP faults have derailed schools in jurisdictions' RP cases

If damage control happens too late, problem may become too severe or entrenched to respond

- **Address IEP weaknesses aggressively**

Degree of school effort and resources expended must be proportional to risk of RP litigation

Better to expend energies addressing an IEP area than dispute it heatedly in the hearing

Watch for phenomenon where school staff have fully lost sight of a glaring IEP deficiency

- **Watch for escalating use of restraint**

Parent attorneys will argue restraints are evidence of inappropriate FBA/BIP, lack of proper BIP implementation, need for 24-hour structure of RP

Confirm use of restraint accords with State law

Inform staff that escalating use of restraint will hurt school's case at hearing (even if lawful)

Team must redouble efforts to prevent aggressive episodes through FBA and BIP

- **Act proactively if student is hospitalized**

Common situation leading up to RP litigation

Request hospitalization records

Key records: intake eval, discharge report

Consider recommendations of discharge report in an IEP team meeting

Seek consent to communicate with hospital staff regarding transition, school-based needs

- **Respond to suicidal ideations/gestures**

Implement school's suicide prevention/intervention protocol

IEP team should meet to take appropriate action to revise IEP (increased counseling, supervision)

School should offer to coordinate with private responders

Consider a suicide risk assessment

- **Document any lack of parental cooperation**

Unreasonable parent conduct is key equitable factor in RP cases

Examples: refusal of parent services, single-minded RP objective, blocking IEP revisions, refusal to consent to records requests, refusal to allow coordination with private providers

Make sure school staff explain and document the impact of poor cooperation in IEP meetings

- **Propose IEP facilitation or mediation**

Both options are by mutual agreement

IEP facilitation can assist with IEP impasses, parental non-cooperation areas

Mediation can result in binding agreements and releases of liability, but likely with attorneys' fees

Generally, school is looking for an agreement that forestalls RP, so if parent is set on RP, mediation may not succeed

- **Consider IEP placement in residential facility**

Before discussing in IEP meeting, inquire about SEA funding contribution (depends on State)

Have staff research facilities

Distance from home is an issue (increases costs of parent visits, travel for family therapy)

For school, quality of transition services back to school is a key factor in choosing a RP

Litigation Strategies

- **Request current reevaluation upon placement or parental notice of placement**

Choose evaluator with an eye to providing expert testimony

Have evaluator review private evals, if any

Have evaluator observe student in RP

Have evaluator review RP treatment plan, educational program

Litigation Strategies

- **Discover information about facility and program**

Collect pamphlets, website info

Discover ratios, typical day, various settings and services, discharge criteria, cost breakdown, type of patients typically served

Consider deposition of RP director or case mgr

- **Determine true focus of RP program**

What is the reason for typical placements?

Review treatment plan closely (but also discover typical treatment plan focus)

Discover whether RP offers services specifically designed for reintegration into regular school setting

Are discharge criteria primarily focused on mental health issues?

- **Seek a staff visit to the RP**

How is the day structured?

What are the staff qualifications and arrangements?

What are the therapy components? Goals?

Are skills being taught? What skills?

Is there a separate dorm, school, and therapy facility?

- **Ascertain how educational services are provided**

Who provides services? What are the staff qualifications?

Are there individualized programs?

Is special education offered? Related services?

Watch for partial day programs, and policies where student remains in dorm and does not attend school due to certain behavior

Identify degree of coordination between therapeutic program and educational program

- **Scrutinize educational records from RP**

Make sure you understand the progress reports (or get help in discovery)

Watch for lack of progress, limited progress

Watch for lack of individualization

Examine attendance records, degree of student participation in educational program

Do therapy-related records reveal any interest in educational progress?

- **Ascertain legal landscape in your jurisdiction**

RP analysis in federal courts is in a state of evolution, with some Circuits challenging traditional analysis

Traditional “inextricably intertwined” analysis

If educational and medical/psychiatric needs are “inextricably intertwined,” school is liable for full costs of RP under IDEA

- **Ascertain legal landscape in your jurisdiction**

Traditional “inextricably intertwined” analysis

Originates with *Kruelle v. New Castle Sch. Dist.*, 552 IDELR 513 (3rd Cir. 1981).

Tilton v. Jefferson Co. Bd. of Educ., 554 IDELR 513 (6th Cir. 1983).

McKenzie v. Smith, 557 IDELR 119 (D.C.Cir. 1985).

Traditional “inextricably intertwined” analysis

Mrs. B. v. Milford Bd. of Educ., 25 IDELR 217
(2nd Cir. 1997).

Independent Sch. Dist. No. 284 v. A. C., 35
IDELR 59 (8th Cir. 2001).

RP must be primarily oriented to education (emerging minority view analysis)

Richardson Ind. Sch. Dist. v. Leah Z., 52 IDELR 277 (5th Cir. 2009)(p 1-2)—Court finds:

Traditional analysis “expands school district liability beyond that required by IDEA”

Test: (1) RP must be “essential” to receipt of FAPE, and (2) “primarily oriented toward enabling the child to obtain an education”

Envisions itemization of RP components

RP must be primarily oriented to education (emerging minority view analysis)

Dale M. ex rel. Alice M v. Bd. of Educ. of Bradley-Bourbonnais, 33 IDELR 266 (7th Cir. 2001)(RP required when necessary predicate for learning as opposed to response to medical, social or emotional problems segregable from learning.)

See also *Munir v. Pottsville Area Sch. Dist.*, 59 IDELR 35 (M.D.Pa. 2012)(RP program designed primarily to prevent suicide by means of mental health treatment)(**p. 2-4**)

Variant hybrid analysis

Clovis USD v. California Office of Admin. Hearings, 16 IDELR 944 (9th Cir. 1990);
Ashland Sch. Dist. v. E. H., 53 IDELR 177 (9th Cir. 2009).

Mary T. v. School Dist. of Philadelphia, 52 IDELR 211 (3rd Cir. 2009)

Shaw v. Weast, 53 IDELR 313 (4th Cir. 2010).

- **Consider an Offer of Settlement**

See 20 U.S.C. §1415(i)(3)(D)(i); 34 C.F.R. §300.517(c)(2)(i)—If rejected by parent, and result at hearing is no better, no fees after date of offer, even if some relief granted

Could contain IEP improvements, compensatory services, high-structure program, private day placement, parent/home services

Courts have tended to require that attorneys' fees be made part of offer in order to have statutory effect

- **Consider an Offer of Settlement**

A good strategy if school case has some relative weaknesses that are not fatal

Make terms specific (akin to specificity in a mediation agreement)

Can include disclaimers of liability (under FRCP 68 caselaw)

- **At the hearing**

Establish that RP staff cannot render opinion on education, only medical/psychiatric needs

Establish that RP staff cannot testify on details of public school offerings and programs

Distinguish home problems vs. school functioning (point to strengths exhibited at school)

In 5th and 7th Circuits, the nature and focus of the RP program is key

- **At the hearing**

In traditional Circuits, schools must show how their IEPs address emotional, social, and behavioral needs

Point out any spotty educational performance at RP, or program deficiencies

Have school staff testify about any parent non-cooperation